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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

187

No. 274

CO-ORDINATED TRANSPORT, INC. OF ILLINOIS, a Corporation, et al.,

Appellants,

vs.

EDWARD J. BARRETT as Secretary of State of the State of Illinois, et al.,

Appellees.

Petition of Appellants for Rehearing on the Merits.

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Appellees.

Petition of Appellants for Rehearing on the Merits.

Petitioners, Co-Ordinated Transport Inc. of Illinois, and the more than fifty other appellants in case #274, present this petition for rehearing on the merits.

Petitioners respectfully state that the majority opinion, dated February 9, 1953, manifests an almost shocking disregard of the facts appearing in the Record, and misconceives the law.

The majority opinion judicially amends the Constitution of the United States without authority, reason or justification. It establishes an unique and unsound principal of law that will eviscerate the Commerce Clause of the Con-

stitution and leave it without force or effect, by requiring no participation in intrastate commerce as a condition to invoking the Commerce Clause by one engaged in interstate commerce.

I.

The factual basis for the majority opinion is that each of the petitioners, some of whom the majority concedes to be interstate carriers, does intrastate business as well (p. 2, majority opinion). Rehearing should be granted to afford petitioners an opportunity to point out to the court from the Record that this factual assumption is incorrect.

Admittedly, the Record shows that each of the petitioners travels some miles over Illinois highways. However, Illinois mileage is not necessarily indicative, let alone conclusive, of an intrastate operation. Yet the majority so assumes. Interstate hauling between Illinois and another state necessarily includes Illinois mileage. Short haul operators may operate entirely within Illinois and may hold no intrastate permit.

Nothing in the Record indicates that certain of these appellants conduct any business other than interstate.

For example, petitioner Cecil Kain owns one truck (R. 69), which is a tractor (R. 70). Kain leases a trailer from Carson and Son, whose home office is in Clinton, Iowa. Then Kain leases both units back to Carson and Son. Carson and Son operate under the Interstate Commerce Commission rate control. Although Kain travels fifty-three thousand (53,000) of fifty-five thousand (55,000) miles in Illinois, all of this mileage is in interstate commerce as a lessee to Carson and Son, which is an Iowa concern. There is not one word in the Record (R. 69-70) that Kain does any intrastate carrying. The contrary affirmatively appears. Kain is engaged entirely in interstate commerce.

Russell Young is a petitioner who leases thirty-eight trucks to others (R. 65). In reality he is a broker (R. 67). This court cannot assume because Young's trucks, leased to others, operated 200,000 miles in Illinois and more than ten times that mileage outside (R. 66), that therefore Young was engaged in intrastate commerce. The mere fact that there is mileage in Illinois is not indicative that this mileage is in intrastate commerce. Interstate commerce does not stop at the state line.

The court stated (P. 2, majority opinion):

> "But it is also true that each of the interstate carriers does an intrastate business as well."

This statement is erroneous and unsupported by the Record. We submit that on this basis alone the court should grant a rehearing.

II.

The majority opinion incorrectly states (P. 2):

> "No effort is made to show that in that way or in some other manner the tax is increased by reason of the interstate operations of any appellant."

The Record clearly shows that the tax on petitioners who are in interstate commerce *is* increased by reason of their interstate operations.

As Mr. Justice Frankfurter pointed out in the minority opinion (P. 1):

> "It has been suggested in a cognate situation, though one involving a comparatively trifling exaction, that interstate commerce is unconstitutionally burdened solely because the taxpayer's interstate business increases the number of trucks on which the tax is levied and hence the total amount due from him."

Here the tax is not trifling. It is huge.

And here the Record affirmatively shows in a great number of instances that the number of trucks is increased by the interstate business of the petitioners, and the tax on these trucks burdens interstate commerce.

For example, petitioner, Co-Ordinated Transport has forty (40) tractors, ninety (90) semi-trailers, and twenty-three (23) straight trucks (R. 38). Its operations cover ten thousand (10,000) miles in Illinois and one hundred twenty-five thousand (125,000) miles outside Illinois each month (R. 41). Co-Ordinated's far flung interstate operations are detailed on page 49 of the Record. Only three per cent (3%) of Co-Ordinated's business is local transportation. Ninety-seven (97%) per cent is in interstate commerce (R. 46). The vast majority of Co-Ordinated's units were utilized solely in interstate commerce. The tax on those units so engaged would not be payable at all but for Co-Ordinated's participation in interstate commerce, and to that extent the tax on that taxpayer was increased and interstate commerce has been burdened.

Petitioner Wagner Transfer Company does seventy-five per cent (75%) of its business in interstate commerce (R. 55). Moreover, the business done in interstate commerce is solely as a contract carrier, while the intrastate business of Wagner Transfer Company is entirely as a common carrier. Thus in the case of Wagner Transfer Company its business carried on in interstate commerce is entirely different from that carried on in intrastate commerce. Again, the number of units which are used in the contract interstate business must of necessity be greater than the number that would be required to carry on the intrastate common carrier business alone.

Petitioner Alton Box Board Company furnishes another example where additional trucks are needed solely for inter-

state commerce. A fleet of trucks is kept exclusively in Indiana at LaFayette (R. 62).

The court's assumption that the interstate operations of petitioners do not increase their tax burden is clearly without warrant in the Record.

Rehearing is urgently demanded to correct the court's factual mistake.

III.

The majority opinion held that because petitioners do intrastate business they are not entitled to the protection of the Commerce Clause of the United States Constitution for their interstate operations.

The factual basis of this holding is not supported by this Record as demonstrated above (I. and II. *supra*).

This decision is a departure from many past decisions of this court. It amounts to an amendment of the Commerce Clause unsupported by logic or authority.

The court's decision is tantamount to restricting the protection of the Commerce Clause to those engaged in interstate commerce only so long as they are not also engaged in intrastate commerce.

It is well settled that it is the interstate commerce which is protected by the Commerce Clause. That a person or a corporation engaged in interstate commerce may also be engaged in intrastate commerce does not deprive him of the protection of the Commerce Clause.

In *Puget Sound Stevedoring Company* v. *Tax Commission*, 302 U.S. 90, the State of Washington laid a gross receipts tax on appellant's business as a stevedoring company. This court found that part of appellant's business was in intrastate commerce and part was in interstate

commerce. The situation was exactly the same as in the case at bar. The Supreme Court of Washington had affirmed a judgment dismissing a suit to enjoin the collection of the tax. On appeal this court modified the decree as being erroneous to the extent that it upheld the tax on that part of the Appellant's business which was interstate commerce. The court stated (p. 94):

> "The business of loading and unloading being interstate or foreign commerce, the state of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. . . .
>
> "The business of appellant, in so far as it consists of supplying longshoremen to shipowners or masters without directing or controlling the work of loading or unloading, is not interstate or foreign commerce, but rather a local business, and subject, like such business generally, to taxation by the state."

The *Puget Sound* case is typical of the host of decisions to which Mr. Justice Frankfurter referred in the dissenting opinion. The *Puget Sound* case was cited on page 4 of appellant's reply brief. The majority opinion made no mention of this decision and could not and did not distinguish it.

Nor did the court mention or distinguish *Freeman* v. *Hewitt*, 329 U.S. 249, reh. den. 329 U.S. 832, cited at pp. 5 and 6 of appellant's reply brief.

In the *Freeman* case the taxpayer was domiciled in Indiana. The securities had their situs in Indiana. The sale upon which the Indiana tax was imposed was in interstate commerce. In holding that the tax was unconstitutional and in disposing of the contention that because Indiana transactions were likewise taxed at the same rate

as interstate transactions the tax was in all respects proper, this Court stated at page 273:

> "It has been suggested that such a tax is valid when a similar tax is placed on local trade, and a specious appearance of fairness is sought to be imparted by the argument that interstate commerce should not be favored at the expense of local trade. So to argue is to disregard the life of the Commerce Clause. Of course a State is not required to give active advantage to interstate trade. But it cannot aim to control its own. It cannot justify what amounts to a levy upon the very process of commerce across State lines by pointing to a similar hobble on its local trade. It is true that the existence of a tax on its local commerce detracts from the deterrent effect of a tax on interstate commerce to the extent that it removes the temptation to sell the goods locally. But the fact of such a tax, in any event, puts impediments upon the currents of commerce across the State line, while the aim of the Commerce Clause was precisely to prevent States from exacting toll from those engaged in national commerce. The Commerce Clause does not involve an exercise in the logic of empty categories. It operates within the framework of our federal scheme and with due regard to the national experience reflected by the decisions of this Court, even though the terms in which these decisions have been cast may have varied. Language alters, and there is a fashion in judicial writing as in other things."

The *Freeman* case is a complete answer to the Court's holding that because the appellants are engaged in intrastate operations they are therefore in no position to urge that the Illinois taxes amount to an unlawful burden upon their interstate operations.

The court's decision that participation in intrastate commerce robs a petitioner also engaged in interstate commerce of the protection of the Commerce Clause not only

overthrows the many decisions of this court but has the far reaching and vital effect of making any interstate business which incidentally might have an intrastate aspect subject to unlimited tax or regulation by the state wherein it does intrastate business. The interstate business of a railroad which handles local passengers as well might thus be burdened by many states. Gross receipts of chain store operators might be taxed by each state wherein there is an intrastate operation. The utimate effect of this decision is far reaching and dangerous. Plainly its implications were not considered by the majority of this court.

The cases cited by Justices Frankfurter and Jackson on page 3 of the dissenting opinion, *Leloup* v. *Port of Mobile*, 127 U. S. 640, *Western Union Tel. Co.* v. *Kansas*, 216 U.S. 1, and *Pullman Co.* v. *Kansas*, 216 U.S. 56, and "a hundred odd cases since" *all entertained the question of whether interstate commerce was burdened and decided that question on its merits.* In all those cases the party complaining of the regulation, tax, or impost was engaged in both intrastate and interstate commerce. The majority opinion overlooked these well reasoned cases of long-standing importance.

The majority opinion likewise overlooked the important case of *Sprout* v. *South Bend*, 277 U.S. 163 cited on pp. 16, 36 and 39 of appellants' (petitioners') brief.

In the *Sprout* case as here the court (p. 168) discussed at length the operations of Sprout and concluded that Sprout was engaged in both inter and intra state commerce. This court also stated that the requirements of the South Bend ordinance in question made no distinction between buses engaged exclusively in interstate commerce, those engaged exclusively in intrastate commerce, and those engaged in both classes of commerce (p. 167). The fact situation there is thus exactly as it is in the case at bar.

This court in the *Sprout* case concluded that the imposition of the license fee upon Sprout was invalid.

But the important point is that in *Sprout*, despite Sprout's participation in intrastate commerce, the court decided the question of whether or not interstate commerce was burdened *on its merits*. Participation in intrastate commerce did not deprive Sprout of the protection of the Commerce Clause in so far as his interstate business was concerned; neither should the participation of any of these petitioners in intrastate commerce deprive him of the protection which the Commerce Clause affords.

The court overlooked the *Sprout* case, the *Freeman* case, the *Puget Sound* case, and "a hundred-odd" others, and a rehearing should be granted.

IV.

The lone case cited by the majority opinion to support the proposition that ". . . appellants have failed to carry the burden of showing that the tax deprives them of rights which the Commerce Clause protects. *Cf. Southern R. Co. v. King*, 217 U.S. 524, 534." (majority opinion P. 2) fails entirely to support that proposition. In *Southern R. Co.* this court merely held that where one had not properly pleaded his engagement in interstate commerce a judgment against him would be affirmed over the objection that a statute for the violation of which the judgment was rendered violated the Commerce Clause. In *Southern R. Co.* this court relied on the Record before it.

To make a proper disposition of the case at bar, this court is similarly bound to rely on the Record. Here the Record demonstrates without question that petitioners have pleaded and proved *without contradiction* that they are engaged in interstate commerce. Indeed the appellees

admitted petitioners were so engaged in interstate commerce (R. 20 (Answer to Paragraph 1 of Complaint)).

If the *Southern R. Co.* case is authority for the proposition that the court will not hear a case on the merits where engagement in interstate commerce is not pleaded, it is also authority for the converse proposition that where, as here, engagement in interstate commerce is pleaded, proved and admitted that the court must decide the matter on its merits.

The majority by its very citation ("Cf.") acknowledges that the *Southern R. Co.* case does not support its decision. One case and one alone is cited. That case does not support the decision.

In the light of the *Southern Railway* case and its misapplication by this court, the court's admission (majority opinion P. 2) that they do not stop to analyze the evidence tendered by appellants (petitioners here), for they do not reach the issue in this case, is itself decisive of error and of a misapplication of the law.

Rehearing is respectfully demanded in order that the court can consider the case on its merits.

V.

The court on page 2 of the majority opinion states:

> "Clearly it is within the police power of Illinois to exact such a tax at least from intrastate operators."

The sole authority for this proposition cited by the court is the case of *Hendrick* v. *Maryland*, 235 U.S. 610.

The court by the use of the words "such a tax" clearly begs the question presented by these petitioners to the court. In the *Hendrick* case which the court cited, the tax involved ranged in amount from $6.00 to $18.00 per year, depending upon the horse power of the vehicle licensed.

The Illinois statute which is here before the court provides in Section 9 thereof that owners of vehicles shall pay for each calendar year for the use of public highways of this state "a *license fee* of $5.00 for each such vehicle" and later in the same section it is provided that each owner of a motor vehicle shall pay for each calendar year for the use of the public highways "a *tax* at the following rate * * *." (Italics supplied.)

Obviously, the legislature of the State of Illinois had in mind two separate exactions. The former, a license fee, is the same sort of imposition as the court considered in the *Hendrick* case. The petitioners in the case at bar have nowhere complained of that exaction. However, the additional imposition is a tax for the production of revenue and ranges in amounts up to $1588.00 for one year over and above and in addition to the license fee.

The Supreme Court of Illinois, in its decision in this case, recognized that the Illinois Motor Vehicle Act was "both a revenue and police power measure." (412 Ill. 321 at p. 329). This court in the *Hendrick* case specifically pointed out that the statute involved was not a revenue measure and avoided discussion of the act on that basis. Moreover, the court in the *Hendrick* case stated "the unreasonableness of the state's action is always subject to inquiry insofar as it affects interstate commerce." Further the court in the *Hendrick* case, though recognizing that a state may exact compensation for facilities which it provides, specifically states that the action of the state must be treated as correct unless the contrary is made to appear. It was pointed out that in the *Hendrick* case there was no evidence concerning the value of the facilities supplied by the state, the cost of maintaining them or the fairness of methods adopted for collection of charges imposed.

We point out to the court that the entire Record made by the petitioners in this case in the trial court was directed to the proposition that the *tax* of $1588.00 (as opposed to the *fee* of $5.00) bore no relationship to the value of privilege granted. Therefore, on the authority of the *Hendrick* case this court should have examined the evidence and decided the issue in the case and committed error by failing so to do.

The *Hendrick* case not only fails to support the proposition that interstate commerce may be thus burdened but also fails to substantiate the proposition that even intrastate commerce may be so burdened when the imposition bears no such reasonable relationship to the value of the privilege. Even aside from the fact that the *Hendrick* case was dealing with a police power imposition as opposed to a tax for revenue purposes, we submit that the *Hendrick* case, limited to a maximum fee of $18.00 a year, concerning which the court said at p. 624, "and we cannot say from a mere inspection of the statute that its provisions are arbitrary or unreasonable," is not authority for the proposition that an exaction of $1588.00 a year is not arbitrary or unreasonable.

We suggest that the court's use of the *Hendrick* case indicates that the court made a fundamental misapplication of the law and by reason thereof we submit that there should be a rehearing of this cause on its merits, in order for petitioners to present the controlling cases.

VI.

The holding of the court that the objections of these petitioners under the Due Process Clause of the 14th Amendment are without substance is, we submit, erroneous. It is unsupported by any reference to the Record in this case.

The uncontradicted evidence in the Record before the court demonstrates conclusively that most of the truckers involved will be obliged to pay taxes in excess of their net incomes. Moreover, the evidence demonstrates, again without contradiction, that these deficits cannot be recouped by increasing rates charged to customers. This situation is confiscation. There is not a scintilla of contradictory proof in the Record before the court.

The power to confiscate is indeed the exercise of "a different and a forbidden power" to prevent which the Due Process Clause of the 14th Amendment was designed. This court has never held that a useful, harmless, and legitimate business can thus be destroyed. The court has failed to observe the obvious distinction between businesses which might in some respect harm the public and which thus could and should be prohibited under the police power, and those legitimate businesses the right to pursue which is the very life, liberty and pursuit of happiness that the Constitution guarantees.

Rehearing is urgently requested in order that petitioners may inform the court of their position on this issue.

VII.

Petitioners have pointed out above that the failure by this court to decide this case on its merits is unjustified by the facts in the Record and is contrary to the law and established decisions of this court.

Petitioners further contend that this court should rehear the case on its merits, not only because the facts of Record and long established precedent demand such a decision, but also because of the widespread importance of the question here presented to the court. Rehearing is urgently requested in order to apprise the court of the importance of the court's failure to rule on the merits.

The transportation of passengers and freight by motor vehicle in the United States is of comparatively recent origin. With changes in the economy, the law is in a process of development. The rights of the several states to regulate and tax this new form of commerce have been established but without final clarity. The rights of truck owners and operators are almost undefined. In the few cases involving tax or regulation of motor vehicle transportation decided by this court, the nature of the tax or regulation involved was much narrower in scope and the amount of the tax imposed was minuscule in comparison with the broad ambit of and tremendous burden imposed by the Act here in question.

The nature and amount of the tax levied by the Illinois legislature is a far cry from the $6.00 to $18.00 impost passed upon in *Hendriek* v. *Maryland*. That measure was solely an exercise of the police power. In the case at bar the police and revenue powers have both been used to impose a maximum tax of $1593.00 for one truck for one year. The tax here in question is designed to increase the revenue of the State of Illinois by $28,000,000.00 per year.

A decision on the merits is of obvious importance to the commerce among the several states. The group being taxed is the second largest employing group in this nation. It renders services to every city, village and town and to every factory and farm. Certainly such a group is entitled to know whether this monstrous tax is or is not constitutional.

The legislatures of other states are likewise entitled to know the answer to this question and to know what, if any, limitations are to be imposed upon their powers. The State of Illinois has a vital and obvious concern in a disposition of this case upon its merits.

This court, in holding that one who engages in intrastate commerce loses the protection of the commerce clause even though he also engages in interstate commerce, has practically invited a suit to test the validity of the act by one solely engaged in interstate commerce. Such multiplicity of litigation cannot recommend itself to this court, particularly where it is unnecessary, in view of the fact that the court can decide the question upon this Record. Such additional litigation incited by this court's failure to decide this case upon its merits, would of necessity deny to the State of Illinois the orderly and prompt collection of revenue, which, if the State's position in this case is correct, should not thus be suspended.

Finally a decision on the merits is of vital importance to the truckers of Illinois. The uncontradicted evidence in the record establishes beyond doubt that the tax is confiscatory as to them. Their livelihood, as well as the economy of the entire State, is in jeopardy. A decision upon the merits is the only way in which the situation can be reduced to certainty for all concerned.

The question that this court must decide in a decision on the merits simply is "how much is too much?"

It is respectfully submitted that the facts of the case, established law and the importance of the question to the state, the nation and to the large body of individuals interested demands that this court decide the case upon the merits. A rehearing is accordingly requested.

CONCLUSION.

Petitioners respectfully state that this court in its unprecedented, terse and undocumented decision has not fully and completely considered the grounds for or the effect of its decision either with reference to the case at bar or with

reference to the Commerce Clause of the Constitution of the United States. The court has judicially amended that Constitution without justification or authority, and has excluded from the protection of the Commerce Clause of the Constitution hundreds of thousands of individuals whose efforts are the life blood of the Commerce itself, not only in the trucking industry, but in other important aspects of that commerce. The court's decision is likewise of significance to the several states and to appellees herein.

The court has ignored the Record by its own admission and has ignored its own past and long established holdings to reach an unconscionable result.

For the reasons above set forth, petitioners therefor respectfully pray that a rehearing be granted in the above entitled case.

Respectfully submitted,

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I, Sam Alschuler, counsel for the above named petitioners, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

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